Hastings Constitutional Law Quarterly

Volume 21
Number 2 *Winter 1994*

Article 3

1-1-1994

Our Shield Belongs to the Lord: Religious Employers and a Constitutional Right to Discriminate

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By JOANNE C. BRANT**

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* *Psalms* 89:18.

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Introduction

Employment discrimination actions against religious organizations have been plentiful for decades.[1] No judicial consensus has emerged, however, to identify the point at which an employer's claim of religious autonomy must yield to the public interest in eradicating invidious discrimination. Because the only Supreme Court decision in this area[2] turned on the constitutionality of a limited statutory exemption from Title VII,[3] there is no authoritative guidance on the most problematic issue of all: whether the First Amendment exempts religious institutions from the application of employment discrimination laws.

A trilogy of significant law review articles published during the last fifteen years offered various solutions to the controversy.[4] These articles have been widely cited by the lower courts.[5] The Supreme Court's 1990 decision in *Employment Division v. Smith*,[6] however, negates many assumptions upon which the academic commentaries were constructed and undercuts the few points of agreement in the case law.

1. *See generally* ROBERT T. SANDIN, AUTONOMY AND FAITH: RELIGIOUS PREFERENCE IN EMPLOYMENT DECISIONS IN RELIGIOUSLY AFFILIATED HIGHER EDUCATION (1990) (collecting cases involving institutions of higher education).

2. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding statutory exemption from Title VII over Establishment Clause challenge).

3. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991). The application of Title VII to religious institutions is discussed *infra* notes 34-75 and accompanying text.

4. Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987).

5. At least 35 state and federal courts have cited to Bagni, Laycock or Lupu. If one agrees with Judge Posner that citations by other academics are the true measure of influence, these articles measure up.

6. 494 U.S. 872 (1990) (holding that state criminal law on controlled substances may be applied to sacramental use of peyote in Native American Church, and state may deny unemployment benefits to persons discharged for such use).

Prior to 1990, the lower courts had routinely granted religious employers free exercise exemptions from laws governing employment discrimination.[7] This approach may no longer be viable. The lower federal courts are reading the *Smith* decision to prohibit free exercise exemptions from laws that are not directed at religious organizations. Since the employment discrimination laws are not directed at religious institutions, *Smith* requires a reconsideration of the continuing validity of those early decisions. This Article will examine the current constitutional status of exemptions from anti-discrimination laws based on the free exercise rights of religious employers.

The convictions held by both sides of this debate—those who favor constitutional exemptions and those who oppose them—are powerful and deeply felt. Employment discrimination laws reflect society's understanding of legitimate and illegitimate bases of power and status in the workplace. When a religious institution claims a constitutional right to pay women lower wages for performing the same work as men, that institution is not only communicating its religious beliefs; it also is sending a powerful social message about the value of women's labor. Because churches have long enjoyed a role of moral and ethical leadership, the resistance of religious organizations to equal employment laws can undermine the effectiveness of those laws in the public sphere.

As churches continue to involve themselves in business and commercial ventures, the stakes increase on both sides of the equation. The financial growth and commercial expansion of churches not only increase the number of jobs affected by church policies; they also raise issues of competitive disadvantage. Constitutionally-based exemptions from labor and employment laws provide religious organizations with significantly more latitude and bargaining power than their secular competitors. This differential enables churches to acquire even more power and influence in worldly affairs.[8]

On the other side of the equation, enforcing anti-discrimination laws against religious employers threatens religious pluralism by man-

7. *See, e.g.*, Minker v. Baltimore Annual Conference, 894 F.2d 1354 (D.C. Cir. 1990); Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); Young v. Northern Ill. Conference, 818 F. Supp. 1206 (N.D. Ill. 1993).

8. *See* Ira C. Lupu, *Risky Business*, 101 HARV. L. REV. 1303, 1318 (1988) (arguing that religious institutions obtain more leverage over their community from a right to discriminate than from the power to block liquor license applications).

dating conformity to majoritarian values and practices.[9] Religious organizations that oppose federal regulation invariably contend that their employment decisions are linked to their religious convictions. This claim is powerful because it offends both religious and nonreligious Americans by having the courts pressed into judgment on what are essentially matters of faith.[10] These concerns are especially strong when the opposing parties consist of churches and members of the clergy. Courts presented with these claims have frankly expressed their unwillingness to arbitrate disputes involving church policies and the internal discipline of clerics.[11]

Ironically, while church-clergy disputes are a paradigm of an employment relationship deserving constitutional protection, these cases send a forceful message. For example, the exclusion of women from positions of power and influence in the Catholic Church forcefully communicates the inferior status of women within the hierarchy of that church.[12] So long as society professes a commitment to anti-discrimination norms, it cannot turn a blind eye to the role of religion in fostering and reinforcing cultural roles. At a minimum, the dividing lines between spheres of religious autonomy and secular authority should be clearly drawn to allow religion its proper sphere of influence. The current tensions in the Supreme Court's free exercise opinions are painful precisely because the opinions blur existing lines of demarcation.[13]

Prior to *Smith*, the majority of employment discrimination claims against religious employers progressed along predictable analytic lines.[14] First, a court would examine the anti-discrimination law(s) relied on by the plaintiff to determine whether the religious employer was exempted in whole or in part. If no exemptions were available, the court would then consider whether the Free Exercise Clause pro-

9. Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 102 (1989).

10. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86 (1944) ("Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").

11. *See, e.g.*, Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (citing Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990)) ("'We cannot imagine an area of inquiry less suited to a temporal court.'").

12. Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 751 (1992).

13. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2250 (1993) (Souter, J., concurring).

14. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

hibited the law's application. Resolving the free exercise issue required the court to engage in compelling interest analysis. Under that test, as set forth in *Sherbert v. Verner*,[15] government action that substantially burdens religious practices must be justified by a compelling governmental interest and must be pursued by narrowly tailored means.[16] The court would explicitly balance the government's interest in enforcing the challenged law against the interest of the employer in the unburdened exercise of religious liberty. If the interests of the employer outweighed the government's interest, the court would either go on to consider whether granting the exemption presented a problem under the Establishment Clause, or would simply conclude that the law was unconstitutional as applied and dismiss the action. If, on the other hand, the balance of interests favored the government, the court would move on to determine the merits of the employment discrimination claim.[17]

While this analytical framework never achieved the virtue of predictability, it was relatively straightforward for the courts to apply. The lower federal courts built up a body of case law that exempted the relationship between churches and their ministers from the anti-discrimination laws, based on the understanding that failure to do so would abridge the free exercise rights of religious institutions.[18] The main challenges for courts became determining whether or not a particular employment relationship should be characterized as "ministerial,"[19] and whether any independent procedural immunities existed that might protect a religious employer from the investigatory and re-

15. 374 U.S. 398 (1963).

16. *Id.* at 402-03; *see also Lukumi Babalu*, 113 S. Ct. at 2226; Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

17. *See, e.g.*, EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982); Ritter v. Mount St. Mary's College, 495 F. Supp. 724 (D. Md. 1980), *aff'd in part, rev'd in part*, 738 F.2d 431 (4th Cir. 1984); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).

18. *See McClure* 460 F.2d at 560 (refusing to apply Title VII to relationship between church and minister to avoid First Amendment issues); *see also* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (applying *McClure* to exempt all academic employees of theological seminary from Title VII); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (refusing to extend *McClure* to entire faculty of religiously affiliated college).

19. *See* EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (editorial secretary at religious publishing house not a minister); Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982) (same); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980) (teacher of secular subjects at religious school not a minister).

porting processes of state agencies seeking to enforce anti-discrimination laws.[20]

Employment Division v. Smith[21] undermined the most critical part of this analytical framework. In *Smith*, a five-member majority refused to apply the compelling interest test to determine whether the Constitution required an exemption from a neutral criminal law of general application.[22] Instead, Justice Scalia, writing for the Court, indicated that the compelling interest test should be applied only in "hybrid" cases, where the claimant demonstrated that the law burdened both the free exercise right and another fundamental constitutional right (such as freedom of speech).[23] In hybrid cases, the traditional balancing test would still apply, and exemptions would be available when the individual's interest in the exemption outweighed the government's interest in enforcing the regulation. But in non-hybrid cases like *Smith*, the majority determined that the Free Exercise Clause does not require the balancing of individual and governmental interests, and that requests for religious exemptions should be denied.[24]

The scope of the Court's analysis in *Smith* implicitly extended beyond criminal laws to include civil regulations and most lower courts have not hesitated to apply the decision in that context.[25] Accord-

20. *See* Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), *vacated and remanded*, 477 U.S. 619 (1986) (Sixth Circuit immunized pervasively religious school from state investigatory process; Supreme Court reversed, finding abstention was necessary to permit exhaustion of state administrative proceedings).

21. 494 U.S. 872 (1990).

22. *Id.* at 884.

23. *Id.* at 881-85.

24. *Id.* at 890.

25. *See, e.g.*, Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir. 1991) (applying *Smith* to school district's policy requiring equivalency testing as precondition of credit for religious home schooling); Salvation Army v. Department of Community Affairs, 919 F.2d 183, 194-96 (3d Cir. 1990) (holding that *Smith* applies to civil as well as criminal statutes); Rector, Wardens and Members v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990) (applying *Smith* rule to New York's Landmarks Law); Intercommunity Ctr. for Justice and Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990) (applying *Smith* to compel compliance with reporting provisions of Immigration Reform and Control Act); Prince v. Firman, 584 A.2d 8 (D.C. App. 1990) (applying *Smith* to uphold application of state statute governing reversion of property rights over free exercise challenge); Health Services v. Temple Baptist Church, 814 P.2d 130 (N.M. App. 1991) (applying *Smith* to uphold licensing ordinance for child care centers). The Ninth Circuit has, however, limited the application of *Smith* to laws that punish criminal conduct. *See* American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991); NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992). A limited number of district courts have also taken this position. *See, e.g.*, United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991); Church of Scientology v. City of Clearwater, 756 F. Supp. 1498, 1514 (M.D. Fla. 1991).

ingly, a court presented with an employment discrimination claim against a religious employer must resolve the two questions *Smith* makes critical: First, are anti-discrimination laws "neutral laws of general application" within the meaning of *Smith*? Second, does the application of such laws to religious institutions present a hybrid constitutional claim?

Part I discusses and summarizes the case law in this area, both prior to and following the *Smith* decision. Part II addresses the first question, arguing that anti-discrimination laws are neutral and generally applicable laws within the meaning of *Smith*. Part II also considers the alternative position, namely that anti-discrimination laws are neither neutral nor generally applicable. While this position lacks intuitive appeal, it may be pursued by religious employers uncertain of their capacity to mount a successful hybrid claim. Part II concludes that even if anti-discrimination laws fail the neutrality inquiry, religious employers will still be unable to secure constitutional exemptions that go beyond the scope of the legislative exemptions presently available.

Part III considers the second question. This Part discusses various possible hybrid claims, but concludes that courts are unlikely to recognize hybrid claims for exemption. As a result, religious employers are in danger of losing the exempt status courts tended to award them prior to *Smith*.

This Article concludes that *Smith* is fundamentally inconsistent with the existing body of case law exempting religious employers from state and federal anti-discrimination laws on free exercise grounds. If *Smith* continues to command the support of a Supreme Court majority,[26] which is itself an open question,[27] religious employers are likely

26. Justice Scalia's majority opinion in *Smith* was joined by Justices White, Rehnquist, Stevens and Kennedy. Justice O'Connor concurred in the judgment, based on her application of the compelling interest test, but did not agree that the compelling interest test should be confined to cases involving hybrid rights. *Smith*, 494 U.S. at 891 (O'Connor, J., concurring). Last term, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993), Justices Rehnquist, White, Stevens, Scalia and Thomas joined Justice Kennedy in an opinion that reiterated the *Smith* rule.

27. *See, e.g., Lukumi Babalu,* 113 S. Ct. at 2240 (Souter, J., concurring) (stating that *Smith* creates substantial tension with prior case law and should be reexamined). Justice O'Connor expressed strong disagreement with the *Smith* rule in that decision, *id.* at 891 (O'Connor, J., concurring), and Justice Blackmun filed a sharp dissent. *Id.* at 907 (Blackmun, J., dissenting). Justice Stevens joined the majority in both *Smith* and *Lukumi Babalu*, but has not written separately to make the basis for his opinion clear. Justice Thomas joined the majority in *Lukumi Babalu* without a separate opinion and has written no opinions on religion clause issues. Justice Ginsburg has yet to articulate her position while on the Court.

to find themselves limited to the narrow statutory exemptions that the anti-discrimination laws currently provide.[28]

This Article also contends that the hybrid-rights approach to free exercise exemptions is not only jurisprudentially unsound, as others have concluded,[29] but unworkable in practical application. Analyzing the hybrid-rights claim that a typical religious employer might present clearly demonstrates that the walls of this defense will not stand. A successful hybrid-rights claim has the potential to eradicate *Smith* as a precedent;[30] an unsuccessful claim is likely to force a reappraisal of the right of individuals to join together for the purpose of engaging in free speech, free exercise and other constitutional liberties.[31] The former possibility stands as an interesting alternative to the legislative response to *Smith*—the Religious Freedom Restoration Act[32]—a law whose constitutional status remains uncertain.[33] Religious exemp-

28. This situation would have a dramatic impact on religious employers. For instance, the legislative exemptions do not protect religious employers from liability for common employment practices, such as the exclusion of women from ministerial positions.

29. *See, e.g.*, James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991).

30. Justice Souter made this point in *Lukumi Babalu. Lukumi Babalu*, 113 S. Ct. at 2240 (Souter, J., concurring); *see infra* text accompanying notes 190-233.

31. *See infra* text accompanying notes 190-233.

32. The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), incorporates the compelling interest test as a limit on governmental action. A fair assessment of the impact of the Act on this issue is generally beyond the scope of this Article, however, a few comments are warranted. The Act will clearly protect free exercise rights against infringement by any state, since acts of Congress take precedence over conflicting provisions in state statutes. *See, e.g.*, Goldstein v. California, 412 U.S. 546 (1973). Thus, religious employers would be able to obtain exemptions under the Act from any state law prohibiting employment discrimination.

Title VII, however, is a federal statute, entitled to equal deference from the courts. Since the Religious Freedom Restoration Act protects free exercise rights against interference from any "government," defined to include "a branch, department, agency, instrumentality, and official . . . of the United States, a State, or a subdivision of a State," the law has the potential to be a loose cannon in the courts. Courts faced with claimants seeking to enforce a federal statutory right of free exercise, opposed by those seeking to enforce federal laws prohibiting discrimination, will have an unenviable task of statutory construction.

33. Since the Act essentially recasts a judicial interpretation of the First Amendment as a statutory right, it is likely to face constitutional challenge. Opponents of the bill may argue that it violates the doctrine of separation of powers (in effect, the act directs courts to apply the Free Exercise Clause without regard to *Smith*) and is ultra vires (because it may not be supportable as an exercise of Congressional power under either the Commerce Clause or the Fourteenth Amendment). It may also be challenged on Establishment Clause grounds. Possible opponents of the bill include right-to-life groups, who are con-

tions from employment discrimination statutes thus illustrate the practical weaknesses and structural defects of *Smith*, as well as raise very real concerns for religious employers.

I. Religious Institutions and Title VII

Do federal anti-discrimination laws apply to religious institutions? The question has both statutory and constitutional components. This Part will begin by considering the extent to which Congress intended anti-discrimination laws to apply to religious institutions by examining the scope of the statutory exemptions provided to religious employers. Since the statutory exemptions do not protect religious employers from liability for common employment practices, the question of constitutional exemptions will then be considered.[34]

This Part also surveys lower court decisions that have applied the *Smith* rule to deny free exercise exemptions from neutral civil laws. The recent body of precedent indicates that the lower courts are uniformly applying the *Smith* rule in civil contexts and, as a result, are denying most applications for constitutional exemptions.

A. A Brief Overview of Title VII

As the centerpiece of federal anti-discrimination efforts, Title VII of the 1964 Civil Rights Act[35] is a natural starting point for an examination of the anti-discrimination laws most often invoked against religious employers. Title VII claims may be brought in either state or federal courts,[36] and most state laws prohibiting employment discrimination are patterned after Title VII.[37] Accordingly, state courts presented with discrimination claims that arise under state law often look to the federal case law interpreting Title VII for guidance. This Part examines the statutory exemptions Title VII gives religious em-

cerned that the bill may provide a legal basis for abortion. *See generally* James E. Wood, Jr., *The Religious Freedom Restoration Act*, 33 J. OF CHURCH & ST. 673, 678-79 (1991) (arguing that the bill is abortion neutral); *see also*, Ira C. Lupu *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 52-66 (1993) (discussing problems raised by statutes that incorporate constitutional standards, including the Religious Freedom Restoration Act).

34. *See infra* notes 76-85 and accompanying text.

35. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

36. *See generally id.* § 2000e-5(f)(3) (granting federal courts jurisdiction to hear Title VII cases); Yellow Freight Sys. Inc. v. Donnelly, 494 U.S. 820 (1990) (state and federal courts have concurrent jurisdiction over Title VII claims).

37. *See, e.g.*, OHIO REV. CODE ANN. § 4112.02 (Anderson 1991); *see generally* 1 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION, §§ 9.10-9.30 (1993) (collecting and summarizing state statutes).

ployers and briefly summarizes the extent of an employer's obligations under the statute when no exemptions are available.

In general terms, Title VII prohibits any "employer"[38] from discriminating against employees or job applicants with respect to their compensation, or the terms, conditions and privileges of their employment, where the discrimination is based upon the employee/applicant's race, color, religion, sex, or national origin.[39] The statute provides three exemptions applicable to religious employers: the religious corporation exemption,[40] the religious schools exemption,[41] and the "bona fide occupational qualification" provision.[42] These provisions overlap to some extent and are used by employers as alternative defenses.

The religious corporation exemption is found in section 702. This provision exempts religious corporations, associations, educational institutions or societies "with respect to the employment of individuals of a particular religion to perform work connected with" the organization's activities.[43] As enacted, this provision only included employees whose duties were connected with the employer's "religious activities." In 1972, however, Congress deleted the term "religious" and thus broadened the scope of the exemption to include employees whose duties were secular as well as those whose duties were connected to the religious mission of the corporation.[44]

The scope of section 702 is often misunderstood. The exemption only extends to discrimination based on an employee's religion and does not authorize discrimination on the basis of sex, race, color, or national origin. The legislative history is clear on this point, since Congress considered and rejected a blanket exemption that would have placed religious employers outside the scope of covered "employers."[45] Instead, Congress chose to tailor the exemption narrowly,

38. An "employer" is defined as a person engaged in an industry affecting commerce who has 15 or more employees for each working day of 20 or more calendar weeks in the year of or the year preceding the alleged violation. *See* 42 U.S.C. § 2000e(b).

39. *Id.* § 2000e-2(a).

40. *Id.* § 2000e-1.

41. *Id.* § 2000e-2(e)(2).

42. *Id.* § 2000e-2(e)(1).

43. *Id.* § 2000e-1 (section 702(a)).

44. For a discussion of the various proposals and amendments that Congress considered in enacting and amending § 702, see William P. Marshall & Joanne C. Brant, *Employment Discrimination In Religious Schools: A Constitutional Analysis, in* PUBLIC VALUES, PRIVATE SCHOOLS 91, 93-94 (Neal E. Devins ed., 1989).

45. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (discussing legislative history of § 702).

exempting religious institutions only from the law's prohibition of religious discrimination.[46]

The second exemption is specifically directed at religious schools. Section 703(e)(2) permits schools, colleges, universities and other educational institutions that are substantially owned, supported, or controlled by religious organizations to "hire and employ" persons of a particular religion.[47] Once again, this exemption does not authorize discrimination on any basis other than religion. Moreover, because of the "hire and employ" language, courts have limited the scope of this exemption to initial hiring decisions.[48] Because of the overlap between sections 702(a) and 703(e)(2), religious schools typically invoke both provisions to defend against charges of religious discrimination.[49]

These limited exemptions, which authorize discrimination solely on the basis of an employee's religion, are the only statutory relief that Congress specifically provided to religious employers. A third provision, which functions as an affirmative defense,[50] is found in section 703(e)(1) of Title VII.[51] This section permits any employer, religious or secular, to "hire and employ" persons based on their sex, religion, or national origin so long as the employer can prove that characteristic is essential to the performance of the employee's duties. In the statutory parlance, the employer must show that sex, religion, or national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[52]

46. In fact, section 702 may not exempt religious employers from all liability for religious discrimination. The terms of the exemption speak only of the "employment of" individuals, while Title VII's substantive prohibitions extend further, covering the "compensation, terms, conditions and privileges of employment." *Compare* 42 U.S.C. § 2000e-1 (section 702(a)) *with id.* § 2000e-2(a) (section 703(a)). Arguably, the restrictive language of the exemption reflects Congressional intent to permit religious corporations to use religion as the basis for an initial hiring decision, but not to discriminate against employees thereafter with respect to their compensation or other aspects of their employment.

47. *Id.* § 2000e-2(e)(2) (section 703(e)(2)). This provision also applies to schools whose curriculum is directed toward the propagation of a particular religion.

48. *See, e.g.*, EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986) (holding that § 702 does not authorize religious discrimination after employment relationship has attached or in the provision of benefits).

49. *See, e.g.*, Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (finding Catholic school's discharge of Protestant teacher because of remarriage protected by both statutory exemptions).

50. BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 341 (1983).

51. 42 U.S.C. § 2000e-2(e)(1) (section 703(e)(1)).

52. *Id.*

While the bona fide occupation qualification ("BFOQ") defense is popular in employment discrimination cases, the courts have construed it narrowly.[53] Employers may never use race or color as a BFOQ, and customer preference will not suffice to demonstrate that sex, religion, or national origin amounts to a BFOQ.[54] Generally speaking, an employer seeking to hire only men for a particular job must prove that all or substantially all women would be unable to perform the duties of that job in order to make out a BFOQ defense based on sex.[55]

Religious schools have attempted to prove that religion is a BFOQ for certain teaching positions. These efforts have produced mixed results. In *Pime v. Loyola University of Chicago*,[56] the court permitted a Jesuit university to set aside three tenure-track positions under the BFOQ provision in order to maintain a "Jesuit presence" in the philosophy department. However, in *EEOC v. Kamehameha Schools/Bishop Estate*,[57] a school whose founder's will directed that "the teachers of said schools shall forever be persons of the Protestant religion"[58] was not permitted to limit all teaching jobs to Protestants under the BFOQ provision. The Ninth Circuit found that the testamentary language merely expressed a "personal preference" which was insufficient to create a BFOQ.[59]

An interesting issue arising under both the BFOQ defense and the religious employer exemptions is whether discrimination based on

53. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that employer cannot defend single-sex fetal protection policy as BFOQ); Trans World Airlines v. Thurston, 469 U.S. 111, 122-25 (1985) (construing BFOQ defense narrowly in age discrimination suit); Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977) (holding sex is BFOQ for prison guards in "contact positions" within all-male penitentiary).

54. The Equal Employment Opportunity Commission, the agency responsible for interpreting and implementing Title VII, has issued regulations stating that the preferences of customers, clients and co-workers should not be considered in determining whether a BFOQ has been established by the employer. *See* 29 C.F.R. § 1604.2(iii) (1993); *see also* Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (holding that airline cannot use sex as BFOQ for flight attendants based on customer preference).

55. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (rejecting BFOQ defense where employer refused to hire women with preschool age children).

56. 803 F.2d 351 (7th Cir. 1986)

57. 990 F.2d 458 (9th Cir. 1993).

58. *Id.* at 459 n.1.

59. The school was unable to qualify for either the religious corporation exemption (the school's purpose and character were primarily secular and no religious denomination owned, controlled, or managed the school) or the religious schools exemption (school lacked religious control and the curriculum was not directed toward the propagation of the Protestant faith). *Id.* at 461.

an unmarried employee's pregnancy can be defended as discrimination based on religion. There is little consensus on the issue. In *Dolter v. Wahlert High School,*[60] a Catholic school discharged a pregnant, unmarried English teacher. The court found that the employer had failed to prove that adherence to Catholic precepts was a BFOQ for her position.[61] Where counseling teenage girls on birth control was central to the pregnant employee's duties, however, the court accepted the BFOQ defense.[62]

Another employer who offered "head of household" salary supplements to male employees with homemaker spouses, but did not for female employees similarly situated, was unable to prove a BFOQ defense based on the employer's religious beliefs about the differentiated roles of the sexes.[63] The court noted that the BFOQ provision, like the religious schools exemption in section 703(e)(2), referred to "hiring and employment" and reasoned that this language did not authorize religious discrimination in compensation or other employment benefits.[64]

The ability of employees to safely perform their job duties can also be considered as part of the BFOQ inquiry. In *Dothard v. Rawlinson,*[65] safety considerations played a substantial role in the Court's decision to recognize sex as a BFOQ for prison guards in positions requiring close contact with violent male inmates.[66] Another employer was able to establish that adherence to the Moslem faith was a BFOQ for a job as a helicopter pilot ferrying pilgrims to Mecca.[67] In each of these decisions, the safety concerns of the employers were closely connected to the ability of the employees to perform the duties of their position.[68]

60. 483 F. Supp. 266 (N.D. Iowa 1980).

61. *Id.* at 271-72; *see also* Vigars v. Valley Christian Ctr., 805 F. Supp. 802 (N.D. Cal. 1992) (finding that acting as a "role model" was not central to plaintiff's job duties as a librarian where she was discharged for out-of-wedlock pregnancy).

62. *See, e.g.*, Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) (upholding non-religious employer's dismissal of an unwed, pregnant employee). The employer in *Chambers* did not attempt to argue that the discrimination was based on religion.

63. EEOC v. Fremont Christian Sch., 781 F.2d 1362 (4th Cir. 1986).

64. *Id.* at 1366-67.

65. 433 U.S. 321 (1977).

66. *Id.* at 336.

67. Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) (noting that Muslim law prohibits non-Muslims from flying to Mecca on punishment of death).

68. *See, e.g.*, Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986) (rejecting BFOQ defense where employer refused to grant Jewish physicians rotations in Saudi Arabia based on employer's concern for their safety).

If an employer does not fall within any of these three statutory exemptions, then the employer is required to comply with the duel obligations imposed by Title VII. First, an employer must "reasonably accommodate" its employees' religious observances and practices unless the employer can demonstrate that accommodation would entail "undue hardship on the conduct of the employer's business."[69] In addition, an employer must comply with the general statutory prohibition on religious discrimination against employees and job applicants, with respect to both their compensation and the terms, conditions, and privileges of their employment.[70]

The potential force of the reasonable accommodation requirement has been largely diluted by a series of Supreme Court opinions.[71] Generally, employers have little difficulty winning religious discrimination cases that turn on the question of accommodation.[72] Plaintiffs tend to prevail in these actions only where the employer offers neither accommodation nor proof of undue hardship.[73] Because the religious accommodation cases rarely involve constitutional issues,[74] this Article will not review those cases in greater detail.

69. 42 U.S.C. § 2000e(j) (1988).

70. *Id.* § 2000e-2(a); *see* EEOC v. Fremont Christian Sch. 781 F.2d 1362, 1366-67 (4th. Cir. 1986).

71. The Supreme Court has interpreted "undue hardship" to mean any accommodation that results in more than a de minimis cost to the employer. Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (employer meets duty of reasonable accommodation by attempting to find voluntary replacement for employee observing Saturday Sabbath; no obligation to create exception to seniority system or pay premium wages for overtime work). The employer is not required to prove that each accommodation proposed by the employee would result in undue hardship; it is enough if the employer has offered some accommodation. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (school not required to prove teacher's proposed accommodations entailed undue hardship; existing contractual right to take unpaid leave constituted reasonable accommodation).

72. *See, e.g.*, United States v. Board of Educ., 911 F.2d 882 (3d Cir. 1990) (holding that accommodation is not required where criminal statute prohibits employee's conduct); EEOC v. Ithaca Indus., Inc., 829 F.2d 519 (4th Cir. 1987) (finding employer's efforts to find voluntary replacement workers and select workers for Sunday shifts on rotating basis satisfied duty of reasonable accommodation); Wisner v. Truck Cent., 784 F.2d 1571 (11th Cir. 1986) (finding employer reasonably accommodated employee by offering to move employee to alternative position that did not entail Saturday work).

73. *See, e.g.*, EEOC v. Universal Mfg. Corp., 914 F.2d 71 (5th Cir. 1990) (partial accommodation not reasonable); EEOC v. University of Detroit, 904 F.2d 331 (6th Cir. 1990) (same); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481 (10th Cir. 1989) (settlement offers during administrative proceedings not reasonable accommodation); EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (employer made no effort to accommodate or prove undue hardship); Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978) (same).

74. *Cf.* United States v. Board of Educ., 911 F.2d 882 (3d Cir. 1990) (rejecting free exercise claim where Muslim teacher brought free exercise and accommodation claims against school board for enforcing Pennsylvania garb statute). Some have argued that less

With the statutory framework in place,[75] this Article now turns to consideration of the constitutional issue: Whether a religious employer should be able to obtain an exemption from Title VII (and other anti-discrimination laws) that goes beyond the aforementioned statutory exemptions, based on the employer's right to religious liberty.

B. Constitutional Issues: The Uneasy Coexistence of *McClure* and *Smith*

As a review of the statutory framework demonstrates, religious employers seek constitutional exemptions because the existing statutory framework does not protect them from liability for common employment practices. Consider some familiar, and less well-known, examples of these practices:

(1) Catholic doctrine prohibits the ordination of women as priests, and only permits them to serve as acolytes or communion ministers in extraordinary circumstances;[76]

(2) An employer with fundamentalist Christian beliefs refuses to employ married women with preschool age children, on the grounds that these women belong at home as primary caregivers;[77]

(3) A religious publishing house offers "head of household" benefits to male employees with dependent spouses but refuses to provide the same benefit to female employees similarly situ-

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restrictive interpretations of the reasonable accommodation requirement would have raised Establishment Clause issues by violating the principle of equal associational liberty; the point is fairly taken. *See* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 593-94 (1991).

75. Other federal anti-discrimination laws provide no exemptions for religious employers. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-633a (1988); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988), *amending* 29 U.S.C. § 215; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1988 and Supp. III 1991) (although private membership clubs that are exempt from taxation under § 501(c) of the Internal Revenue Code of 1986 are also exempt from the ADA's definition of a covered "employer," 42 U.S.C. § 12111(5)(B)(ii)); Rehabilitation Act of 1973, 29 U.S.C. §§ 706-769 (1988).

76. THE CODE OF CANON LAW: A TEXT AND COMMENTARY, c.230, § 1 (1985). The Vatican may change its position and officially approve the use of altar girls. *Vatican Considers Permitting Altar Girls*, CHI. TRIB., June 1, 1993, at 4. Local parishes routinely permit women to serve as lectors (scriptural readers), acolytes and altar girls. Some parishes permit women to serve as deacons. *See generally* Richard N. Ostling, *Cut From the Wrong Cloth*, TIME, June 22, 1992, at 64.

77. Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985).

ated, citing religious convictions regarding different roles for the sexes;[78]

(4) A religious employer discharges a white female typist for maintaining a casual social relationship with a black man, citing the employer's religiously motivated objection to interracial relationships.[79]

None of these examples fits neatly into the statutory exemptions that permit religious corporations and religious schools to discriminate on the basis of their employees' religious beliefs. The religious beliefs of the employees are not the issue in these examples; each of the employees or job applicants belongs to the same religious group as the employer. The issue is the sex—and in the last case race[80]—of the employee. Each of these examples describes an employment practice that would probably render a secular employer liable for sex or racial discrimination.

Although each of these examples does *involve* religion, this involvement is irrelevant to the statutory analysis because the challenged employment practice is based upon a religious belief of the *employer*. Sections 702 and 703(e)(2) permit certain employers to discriminate on the basis of their *employees'* religious beliefs.[81] But these provisions do not permit other kinds of discrimination based on the religious beliefs of the employer. While limited, the legislative history of these provisions accords with the clear language of the statute.[82]

78. EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982) (rejecting free exercise claim of religious employer).

79. Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975) (rejecting the free exercise claim of the religious employer).

80. Liability for racial discrimination can be imposed where employers penalize nonminority employees because of their relationships with or advocacy on behalf of minorities. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986) (upholding claim for race discrimination where employment is refused because of plaintiff's interracial marriage); Reiter v. Center Consol. Sch. Dist., 618 F. Supp. 1458 (D. Colo. 1985) (Title VII prohibits discrimination based on an employee's association with Hispanic community); Chacon v. Ochs, 780 F. Supp. 680 (C.D. Cal. 1991) (Caucasian woman subjected to hostile work environment because of her marriage to Hispanic man); Erwin v. Mister Omelet of Am., Inc., 54 Fair Empl. Prac. Cas. (BNA) 1456 (M.D.N.C. 1991) (Caucasian female has claim for race discrimination based on her marriage to black male).

81. *See supra* notes 43-49 and accompanying text.

82. *See, e.g.*, Section-by-Section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, *reprinted in* SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON LABOR AND PUBLIC WELFARE OF THE UNITED STATES SENATE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 1843, 1845 (Comm. Print 1972) ("[religious] organizations remain subject to the provisions of Title VII with regard to race, color, sex, or national origin"); *see also* Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) ("Title VII does not confer upon religious organizations a license to make [relevant hiring] decisions on the basis of race, sex, or national origin."); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), *cert. denied*, 409 U.S.

Although the issue is a close one, the BFOQ defense may assist the Catholic Church in example (1),[83] but that defense will be of no help to the employers in the remaining examples. In short, nothing in Title VII supports the right of a religious employer to engage in sex or racial discrimination.

To avoid liability for these practices, employers must argue that even though their religious convictions may not trigger the statutory exemption, their convictions are important on a constitutional level. The Catholic Church contends that the ordination of women would be contrary to Catholic scripture and apostolic tradition.[84] Other employers have made similar claims as to their challenged employment practices.[85] The question is whether religious employers have a constitutional right to religious liberty that entitles them to contravene a congressional mandate that sex and race are impermissible criteria for employment decisions.

1. The McClure *Case and Its Progeny*

Mrs. Billie B. McClure was commissioned as an officer in the Salvation Army in June of 1967. When she learned that she was receiving a lower salary and fewer benefits than similarly situated male

896 (1972) ("The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin."); Dolter v. Wahlert High School, 483 F. Supp. 266, 268-69 (N.D. Iowa 1980) ("There is no indication in the legislative history that when Congress enacted the 1972 amendment [to Title VII that] it also intended to exempt sectarian schools from liability for sex discrimination.").

83. Arguably, a woman who seeks ordination in the Catholic Church is not an orthodox Catholic, thus the Church's refusal to employ such a woman is based upon her religious beliefs. This argument is spurious because some male priests, who have taken a favorable position on ordaining women, are still considered orthodox. Moreover, recent polls show two thirds of American Catholics believe that women should be ordained, and a similar percentage disagrees with other teachings of the Church. Kenneth L. Woodward, *Mixed Blessings*, NEWSWEEK, Aug. 16, 1993, at 43. If willingness to ordain women is not "orthodox" Catholicism, it would seem that orthodox Catholics are a distinct minority. More fundamentally this argument would permit the Church to treat dissident members as Catholics for purposes of membership, financial support and participation in church proceedings, but not "orthodox enough" for full employment opportunities. *See generally* Lupu *supra* note 4, at 435-42 (arguing that religious organizations should be able to designate positions as "members only" without violating discrimination norms).

84. THE CODE OF CANON LAW, *supra* note 76, at c.1024. The Vatican reasserted its commitment to an all-male priesthood in a 1977 pastoral letter, and a second pastoral letter on women's issues still under discussion reiterates the ban. *See generally* Bonnie Brennan, *Catholic Women: What Progress Have They Made?*, TORONTO STAR, Aug. 3, 1991, at J10.

85. *See, e.g.*, EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700, 708 (S.D. Ohio 1990) (religious school limitations on family allowance based on "divinely ordained status of individuals within the family structure.").

officers, Mrs. McClure complained to her superiors and to the Equal Employment Opportunity Commission. The Army demoted her to a secretarial position and subsequently discharged her.[86]

Mrs. McClure brought suit against the Salvation Army, claiming that she had been discriminated against because of her sex.[87] The Salvation Army did not claim a religious justification for treating female officers differently than similarly situated males. Instead, the Army argued that it was not an "employer" within the meaning of Title VII because it was not engaged in an industry affecting commerce; that Mrs. McClure was not an "employee" but rather a volunteer; and that section 702, the religious corporation exemption, was applicable. In the alternative, the Army contended that the application of Title VII would violate the religion clauses of the First Amendment.[88]

The Salvation Army lost on each of the first three arguments,[89] but the Fifth Circuit agreed with the First Amendment argument. The court found that the relationship between the Army and Mrs. McClure was analogous to the relationship between a church and its ministers. It concluded that the application of Title VII to that relationship would "result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment."[90] Since the Supreme Court favors judicial construction of statutes in a manner that avoids constitutional difficulties where such a construction is "fairly possible,"[91] the Fifth Circuit construed Title VII as inapplicable to the employment relationship between churches and their ministers.

As Professor Lupu has pointed out, *McClure* assumes the constitutional issue instead of deciding it.[92] While the holding in *McClure* is framed in terms of congressional intent,[93] the legislative history does not support the court's holding.[94] As Lupu puts it, *McClure* thus rests

86. McClure v. Salvation Army, 460 F.2d 553, 555 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

87. *Id.*

88. *Id.* at 556.

89. *Id.* at 557-58.

90. *Id.* at 560.

91. Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

92. Lupu, *supra* note 4, at 397 n.15.

93. *McClure*, 460 F.2d at 560-61 ("We therefore hold that Congress did not intend . . . to regulate the employment relationship between church and minister.").

94. *See supra* notes 45-49 and accompanying text.

"on a set of constitutional assumptions concerning the impermissibility of government intrusion into the church-minister relationship."[95]

a. The Church Property Cases

The constitutional assumptions to which Lupu refers are drawn from a series of Supreme Court decisions involving church property disputes. The lower court decisions following *McClure* rely heavily upon these cases to determine whether churches can be constitutionally bound by laws governing employment relations. A brief review of the church property cases suggests that this reliance was misplaced.

The first significant church property decision, *Watson v. Jones*,[96] held that federal courts should be bound by determinations of the highest ranking church tribunal in resolving disputes between competing factions involving the ownership of church property. Subsequent decisions continued to forbid judicial resolution of issues involving religious doctrine[97] and required that deference be given to whomever was legally empowered to speak for the church.[98]

This line of precedent took a slightly different tack with the Supreme Court's 1979 decision in *Jones v. Wolf*.[99] In that case, a Presbyterian congregation in Macon, Georgia, found itself in an internal disagreement over questions of doctrine and practice. A majority of the congregation elected to withdraw its affiliation with the Presbyterian Council of the United States. A minority of the congregation

95. Lupu, *supra* note 4, at 396-97. Professor Lupu goes on to counter those assumptions and to argue in favor of a "members-only" principle. *Id.* at 432-33. Under this approach, religious organizations would have constitutional latitude to make employment decisions based on their membership policies. *Id.* at 435-38. The organization would not be entitled to base employment decisions on race, sex, or national origin unless membership in the church turned on those grounds. *Id.* at 439-40.

96. 80 U.S. (13 Wall.) 679 (1871).

97. *See, e.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (judiciary may not resolve controversies over religious doctrine and practice in order to adjudicate disputes involving church property); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952) (neither legislature nor judiciary may regulate church administration); Gonzales v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (dismissing suit against archbishop who denied plaintiff a chaplaincy because he lacked qualifications required by canon law); Maryland and Virginia Eldership of the Churches of God, Inc. v. Church of God, 396 U.S. 367, 368 (1970) (Brennan, J. concurring) ("[A] State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.").

98. In hierarchical churches, such deference is owed to the highest-ranking member of the church hierarchy. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976). In congregational churches, deference is directed to the majority of the congregation. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 607-10 (1979).

99. 443 U.S. 595 (1979).

wished to retain its national affiliation, and the two factions brought suit over their respective rights to control the church property.

The Supreme Court was unable to determine which group was entitled to *Watson*-style deference. Most Presbyterian churches are congregational in structure, and the division of authority between local congregations and the national council tends to be intricate.[100] The Supreme Court chose to fashion an alternative approach that could be used in cases where *Watson*-style deference was problematic. In such cases, *Jones v. Wolf* authorized the use of "neutral principles of law" in order to resolve intra-church disputes. Applying that approach, the Court examined various church documents from a secular perspective to determine whether the parties had intended to create a trust or other legal device to control the disposition of church property.[101]

As various commentators have argued,[102] *Jones v. Wolf* sharply undermines any claim that the Free Exercise Clause confers a wide-ranging right of autonomy upon religious organizations.[103] While the "neutral principles" approach does permit churches to structure their internal affairs in a manner that minimizes the likelihood of judicial nullification, this capacity is common to all corporate entities. The capacity to minimize judicial interference neither supports nor appears to flow from a sweeping grant of institutional autonomy unique to religious organizations.[104] Moreover, resort to neutral principles may convince a judicial tribunal to overrule or disregard the position of a clearly established church spokesperson. Such a result would be particularly damaging to theories of church autonomy.[105]

Even if the church property cases did support a strong theory of church autonomy, employment discrimination cases are distinguishable. In many of these discrimination cases, the employee is not even a member of the church; thus the dispute is not an "internal" church matter—much less an ecclesiastical dispute.[106] Moreover, there are strong state interests present in employment discrimination cases that

100. *Id.* at 602-04.

101. *Id.*

102. Lupu, *supra* note 4, at 406-09; William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 313 (1986).

103. *See, e.g.*, Laycock, *supra* note 4, at 1390 (arguing that anything a religious organization does amounts to the free exercise of religion).

104. Lupu, *supra* note 4, at 407-08.

105. *Id.*

106. *Id.*

go beyond the rights of the parties.[107] The church property cases, on the other hand, rarely involve a state interest beyond the omnipresent concern for a peaceful settlement of controversy. Nonetheless, the church property cases continue to influence the lower courts in their resolution of employment discrimination cases against religious employers. A number of courts[108] have explicitly relied upon those precedents—and upon *McClure*—in exempting religious employers from any liability for employment decisions involving "ministerial"[109] employees.

In resolving the question of ministerial status, the courts look to whether the employee performs sacerdotal functions, serves as an intermediary between the church and its congregation, has been ordained by the church, or serves as a church governor.[110] The inquiry is

107. *Id.* at 408-09.

108. *See, e.g.*, Scharon v. Saint Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (dismissing age/sex discrimination claim brought by ordained chaplain against church hospital on free exercise and establishment grounds); Minker v. Baltimore Annual Conference, 894 F.2d 1354 (D.C. Cir. 1990) (dismissing age discrimination claim of Methodist minister denied pastorship on free exercise and establishment grounds); Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (applying *McClure* to insulate church from sex discrimination claim involving clergy applicant); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (applying *McClure* to all academics in theological seminary since such personnel qualified as "ministers"); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974) (dismissing civil rights claims of pastor evicted from church parsonage based on *McClure* and church property cases); Young v. Northern Ill. Conference of United Methodist Church, 818 F. Supp. 1206 (N.D. Ill. 1993) (applying *McClure* to insulate church from race/sex discrimination suit by probationary minister denied appointment as "elder"); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich. App. 1988) (finding musical director with pastoral/liturgical leadership role in church to be a minister).

109. To determine whether an employee can properly be considered a minister, the courts look to an employee's duties and responsibilities and place little, if any, weight upon the employer's designation. *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (applying *McClure* to all academics in theological seminary since such personnel qualified as "ministers"). Some religious organizations hold that all their members are ministers. A court will not revoke this designation, but it does not control the employee's status as a matter of law. Courts that have construed ministerial exemptions in other statutes have not been persuaded by claims that all members of a religious group are ministers. *See, e.g.*, Dickinson v. United States, 346 U.S. 389, 394 (1953) ("Certainly all members of a religious organization or sect are not entitled to the exemption [from selective service laws] by reason of their membership, even though in their belief, each is a minister."); *accord* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir.), *cert. denied*, 498 U.S. 846 (1990) (same holding as to Fair Labor Standards Act); Olsen v. Comm'r, 709 F.2d 278, 282 (4th Cir. 1983) (same holding as to tax laws);

110. *See, e.g.*, *Dole*, 899 F.2d at 1396, *Southwestern Baptist*, 651 F.2d at 283-84; EEOC v. Mississippi College, 626 F.2d 477, 485-86 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700, 706 (S.D. Ohio 1990).

flexible and depends in part upon the structure of the religious organization. In most cases where the employee performs largely secular duties, the courts have found that the position is "nonministerial" and refused to extend the *McClure* exemption to employers.[111]

b. The Limits of *McClure*

While *McClure* has enjoyed substantial influence, some courts do not construe the First Amendment to prohibit all inquiry into the relationship between a church and its ministers. In *Welter v. Seton Hall University*,[112] two Ursuline nuns took a leave from their religious order to teach computer science courses. The sisters brought a breach of contract action against the university when it failed to provide them with terminal-year contracts required by their employment agreement. The university raised a First Amendment defense, which the court rejected because the sisters performed no ministerial functions as university employees.[113]

The *Welter* court suggested in dicta that even clergy should be able to litigate disputes that do not involve church doctrine. The court also noted that religious employers may "bargain away" any constitutional privilege that might otherwise be asserted by issuing employment contracts or legally binding employment handbooks.[114]

As a general rule, when members of the clergy bring actions against their churches based on tort,[115] state law,[116] or the failure to follow established church procedures,[117] the courts have dismissed the

111. *See, e.g.*, EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982) (editorial secretary in religiously affiliated publishing house not a minister); Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802 (N.D. Ill. 1992) (education director at religious school not a minister); Lukaszewski v. Nazareth Hosp., 764 F. Supp. 57 (E.D. Pa. 1991) (director of physical plant at hospital not a minister); EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700 (S.D. Ohio 1990) (teachers and administrators in religious school not ministers); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975) (receptionist/typist not a minister); Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992) (nuns on leave from Ursuline order teaching computer science not ministers in their relationship with university).

112. 608 A.2d 206 (N.J. 1992).

113. *Id.* at 214.

114. *Id.* No cases directly present this issue.

115. *See, e.g.*, Higgins v. Maher, 258 Cal. Rptr. 757 (Ct. App. 1989), *cert. denied*, 493 U.S. 1080 (1990) (dismissing priest's tort claims against bishop citing entanglement concerns).

116. *See, e.g.*, O'Connor Hosp. v. Superior Ct., 240 Cal. Rptr. 766 (Ct. App. 1987) (ordered not published) (dismissing wrongful termination claim by chaplain against Catholic hospital because of free exercise concerns).

117. *See, e.g.*, Chavis v. Rowe, 459 A.2d 674 (N.J. 1983) (dismissing suit that alleged use of improper procedures in "defrocking" former deacon).

suit on First Amendment grounds. But there are exceptions, generally where proof of the employer's wrongdoing can be accomplished without inquiring into religious doctrine. For example, courts have been willing to hear sexual harassment charges brought against a church by an associate pastor who sought only monetary relief.[118] Courts have also heard defamation charges involving churches and ministers.[119]

As noted previously,[120] religious employers have raised the First Amendment not only to bar liability for employment discrimination, but also to avoid state reporting requirements and investigatory procedures that enable agencies to determine whether a violation has occurred. A Sixth Circuit decision initially suggested that such procedural immunities were available to religious employers.[121] However, the Supreme Court reversed on abstention grounds[122] and indicated in dicta that such procedural immunities were not appropriate.[123] Courts and commentators that have considered the issue tend to agree that there is no constitutional barrier that precludes a state agency from investigating a complaint against a religious employer to determine whether the religious reason given for the challenged employment action is a pretext for illegal discrimination.[124]

c. The "Regulatory Establishment" Defense

Although the constitutional basis for the "church-minister" exemption in *McClure* was the Free Exercise Clause of the First Amend-

118. *See, e.g.*, Black v. Snyder, 471 N.W.2d 715 (Minn. App. 1991).

119. *See, e.g.*, Marshall v. Munro, 845 P.2d 424 (Alaska 1993) (allowing defamation claim to proceed, but dismissing breach of contract claim as too closely connected to ecclesiastical matters).

120. *See supra* text accompanying note 20.

121. Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 961 (6th Cir. 1985), *rev'd*, 477 U.S. 619 (1986).

122. The Supreme Court held that the federal court should have abstained from adjudicating this case under Younger v. Harris, 401 U.S. 37 (1971), which teaches that federal courts should not interfere with pending state civil and administrative proceedings. *Younger*, 401 U.S. at 41, 43-45. For an excellent summary of abstention doctrine and its application in *Dayton Christian Schools*, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION, §§ 13.1 to 13.4 (1989).

123. *Dayton Christian Sch.*, 477 U.S. at 628 ("[The state agency] violates no constitutional rights by merely investigating the circumstances of [the] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.").

124. *See, e.g.*, Sacred Heart Sch. Bd. v. Labor & Indus. Review Comm'n, 460 N.W.2d 430 (Wis. App. 1990) (holding that state agency does not violate First Amendment by investigating whether religious reason asserted as basis for discharge was in fact pretext for age discrimination against lay teacher in religious elementary school); Lupu, *supra* note 4, at 413-16 (arguing that any procedural immunity for religious institutions must be closely tailored to a substantive immunity from state regulation).

ment,[125] some courts following *McClure* have grounded the exemption on a combination of free exercise and establishment principles.[126] The Establishment Clause issue is whether applying the law to religious employers will cause excessive entanglement between church and state.[127]

These "regulatory establishment" claims are routinely invoked by employers and supported by some commentators.[128] These claims have been sharply criticized, however, on both theoretical and pragmatic grounds.[129] Critics argue that it is oxymoronic to claim that a regulation restricting religion simultaneously establishes religion. Two more substantial concerns are that the precedent relied upon to support regulatory establishment claims implies no limit on their scope, and entanglement concerns cannot be overridden even by a genuinely compelling state interest.[130] Moreover, regulatory establishment claims provide a benefit to religious organizations that is not available to secular businesses, resulting in religious favoritism.[131] Each of these arguments suggests that the regulatory establishment claim merits little attention by the courts.

Other scholars have argued that entanglement standing alone is insufficient to support a finding that a law violates the Establishment

125. McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

126. *See, e.g.*, Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (dismissing age/sex discrimination claim of ordained chaplain against church hospital on free exercise and establishment grounds); Minker v. Baltimore Annual Conference, 894 F.2d 1354 (D.C. Cir. 1990) (dismissing age discrimination claim of Methodist minister denied pastorship on free exercise and establishment grounds); Young v. Northern Ill. Conference of United Methodist Church, 818 F. Supp. 1206, 1211 (N.D. Ill. 1993) (applying *McClure* to insulate church from race/sex discrimination suit by probationary minister denied appointment as "elder").

127. Lemon v. Kurtzman, 403 U.S. 602 (1971), created a three-part test for evaluating laws challenged under the Establishment Clause: first, the law must have been enacted for a permissible secular purpose; second, the law's principal or primary effect must be one that neither advances nor inhibits religion; and third, the law must not create undue entanglement between the state and religion. *Id.* at 612. A law that fails any part of this test will violate the Establishment Clause. *See infra* notes 133-35 and accompanying text for a discussion of *Lemon*'s current status.

128. *See, e.g.*, Carl Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984); Note, *Government Noninvolvement with Religious Institutions*, 59 TEX. L. REV. 921 (1981).

129. *See* Marshall & Blomgren, *supra* note 102, at 306-15 (arguing that the Establishment Clause does not support exemptions from state regulation).

130. *Id.* at 306-07, 321-23.

131. *Id.* at 324-26.

Clause.[132] The Supreme Court, for its part, appears ready to abandon the test enunciated in *Lemon v. Kurtzman*[133] altogether once a substitute benchmark can be chosen.[134] In its last two terms, the Court has communicated its distaste for the *Lemon* test by deciding each of three Establishment Clause cases without reliance upon, or more than a passing reference to *Lemon*.[135] Caught between the critics of regulatory establishment and the incipient demise of *Lemon* itself, the regulatory establishment claim can probably be safely interred.

To summarize, prior to 1990 the lower courts tended to hold that the First Amendment barred judicial resolution of employment disputes between churches and "ministerial" employees. Most courts inferred the constitutional bar from the free exercise rights of the church employer; others relied on the potential for undue state entanglement with religion. A minority of courts held that employment disputes between churches and ministers which did not involve doctrinal matters were not subject to the constitutional bar.

The cases upholding the constitutional bar often traced their understanding of the free exercise rights of religious institutions to the Supreme Court's church property decisions. This line of authority is problematic at best. While the Court's early church property decisions indicate that courts should not attempt to resolve "internal"

132. *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673-74 (1980) (arguing that entanglement should not be used as separate constitutional test); Laycock, *supra* note 4, at 1392-94 (contending that entanglement is so imprecise as to be useless as an analytic tool); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 932-35 (1987) (asserting that entanglement prong is unnecessary).

133. 403 U.S. 602 (1971). The *Lemon* test is described *supra* note 127.

134. Various members of the Court have expressed dissatisfaction with the entanglement inquiry and with the *Lemon* test as a whole. *See, e.g.*, Lambs' Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149-50 (1993) (Scalia, J., concurring in the judgment) (collecting cases in which *Lemon* has been criticized); Lemon v. Kurtzman, 403 U.S. 668 (White, J., concurring in part and dissenting in part) (contending that entanglement prong creates an "insoluble paradox").

135. *See* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2482 (1993) (holding that state may provide sign language interpreter to deaf child in parochial school without violating establishment clause; not using *Lemon*); Lambs' Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (deciding that use of school property to show religious film does not violate Establishment Clause; using *Lemon* as alternative ground for decision largely based on free speech principles); Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992) (finding school sponsored graduation prayer violates Establishment Clause without using *Lemon*). Justice Scalia has been especially critical of the *Lemon* test, likening it to a ghoul in late night horror shows that must be killed again and again. *Lamb's Chapel*, 113 S. Ct. at 2149 (Scalia, J., concurring); *see also*, Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

church disputes, later cases approved the use of "neutral principles" of law to resolve church controversies. This line of precedent does not uniformly support a constitutional bar against judicial resolution of employment disputes between churches and their ministers.

Employment disputes involving non-ministerial employees are generally not subject to the constitutional bar. The most problematic type of employees for purposes of the church-minister exemption are teachers in religious schools. If their teaching is religiously oriented, then the employer can attempt to prove that the position is ministerial.[136] Failing that, an employer faced with a Title VII claim might raise a BFOQ defense or any other available statutory exemption. Resolution of these cases is fact-specific. As a result, some cases are particularly difficult to reconcile.[137]

2. Employment Division v. Smith *and the Response of the Lower Courts*

Smith involved two counselors at a drug rehabilitation center who were terminated because of their peyote use during religious ceremonies of the Native American Church. The state denied unemployment compensation benefits based on a finding of work-related "misconduct."[138] On appeal, the Oregon Supreme Court reversed the denial of benefits, finding a violation of the counselors' right to freely exercise their religion.[139] The United States Supreme Court reversed and remanded, directing the state supreme court to determine whether the religious use of peyote was criminal.

On remand, the Oregon Supreme Court found that the use was criminal under state laws, but again awarded benefits on the ground that the religious use of peyote was protected as free exercise. The United States Supreme Court reversed again. Justice Scalia, writing for a bare 5-4 majority, framed the issue as whether Oregon could criminalize the religious use of peyote without violating the Free Exercise Clause of the Constitution.[140] Since Justice Scalia resolved this

136. *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 282 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

137. *Compare* Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (upholding religious school's decision to discharge teacher for remarriage) *with* Vigars v. Valley Christian Ctr., 805 F. Supp. 802 (N.D. Cal. 1992) (denying summary judgment to religious school that discharged librarian who became pregnant out of wedlock).

138. Employment Div. v. Smith, 494 U.S. 872, 874 (1990).

139. *Id.* at 875.

140. *Id.* at 874.

question in the affirmative, Oregon could constitutionally impose the lesser sanction of a denial of unemployment benefits.

The academic response to *Smith* has been sharply critical and voluminous.[141] This Article will only consider the response of the state and lower federal courts to *Smith*. A review of these decisions indicates that the limited reading of *Smith* proposed by some critics[142] has found little favor. The bulk of the lower federal and state courts have read the decision as a bright-line prohibition on exemptions from facially neutral laws that "only incidentally" burden religion.

None of the reported decisions have squarely addressed the apparent tension between *McClure* and *Smith*. *Smith*, however, does appear to be eroding *McClure*'s precedential value. In *Vigars v. Valley Christian Center*,[143] a parochial school dismissed its librarian because of her pregnancy out of wedlock. The district court rejected the employer's free exercise defense to Title VII, stating: "It is clear that Title VII is a secular, neutral statute which, in this case, incidentally has a profound impact on defendants' free exercise of their religion. As in *Smith*, however . . ., such incidental impact does not constitute a violation of the Free Exercise Clause."[144]

Another federal court relied on *Smith* when applying the Age Discrimination in Employment Act to a religious employer.[145] And in *Black v. Snyder*,[146] a state court permitted an associate pastor to pursue sexual harassment claims against her church employer and rejected the church's free exercise defense as precluded by *Smith*.[147] At one level, *Snyder* is typical of a line of decisions permitting the imposition of tort liability against churches where religious doctrine is not

141. *See* sources cited *supra* note 29; *see also Symposium: Religion in Public Life: Access, Accommodation, and Accountability*, 60 GEO. WASH. L. REV. 599-856 (1992). The defenders of *Smith* are few, and their grounds for defending the decision tend to be cautiously delineated. *See, e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 247-48 (1991) (defending *Smith* for abandoning the "conduct exemption"); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991) (defending *Smith*'s rejection of constitutionally compelled exemptions, but conceding that the opinion is unpersuasive and that its "use of precedent borders on fiction").

142. *See, e.g.*, Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 683-84 (1992) ("*Smith* may turn out to be primarily a drug case . . . .").

143. 805 F. Supp. 802 (N.D. Cal. 1992).

144. *Id.* at 809-10.

145. Lukaszewski v. Nazareth Hosp., 764 F. Supp. 57, 61 (E.D. Pa. 1991).

146. 471 N.W.2d 715 (Minn. Ct. App. 1991).

147. *Id.* at 719 (finding discharge-related claims barred by Establishment Clause because of excessive entanglement, but permitting sexual harassment claims to proceed because claimant sought only monetary damages).

implicated.[148] The *Snyder* court's use of *Smith*, however, suggests that it did not consider the absence of any doctrinal connection to be dispositive.

Lower courts have also used *Smith* to impose various statutory regulations upon religious institutions in contexts other than employment relationships. For example, *Smith* has been found to compel dismissal of free exercise challenges to licensing laws prohibiting corporal punishment in day care centers,[149] to campaign finance reform laws,[150] to property laws,[151] and to workers' compensation statutes.[152] One court imposed the reporting requirements of the Immigration Reform and Control Act to religious employers who had a sincere belief that their religion obliged them to provide employment to any person in need.[153] Another decision upheld the fraudulent transfer provisions of the Bankruptcy Code over a free exercise objection.[154]

This brief review of lower court decisions applying *Smith* compels two conclusions. First, the vast majority of lower courts are convinced that the *Smith* rule applies in civil contexts. Second, *Smith* and *McClure* are on a collision course. If the *McClure* case were presented to a court today, with precisely the same facts as before, could the court still find that free exercise prohibits the application of Title VII? As the next Part demonstrates, the answer is "probably not."

148. *See, e.g.*, Gallas v. Greek Orthodox Archdiocese, 587 N.Y.S.2d 82, 86 (N.Y. Sup. Ct. 1989) (holding that church has no First Amendment defense to tort claims arising from sexual abuse of parishioner by bishop, but finding claims barred by statute of limitations); Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 812 (Minn. Ct. App. 1992) (finding imposition of punitive damages against church based on sexual abuse committed by pastor does not violate free exercise rights of church).

149. Health Serv. v. Temple Baptist Church, 814 P.2d 130 (N.M. Ct. App. 1991) (holding that law prohibiting corporal punishment neutral and generally applicable under *Smith* and finding no hybrid claim).

150. People v. LaPorte Church of Christ, 830 P.2d 1150, 1152 (Colo. Ct. App. 1992) (holding that state action against church for failure to make financial disclosures required by Campaign Reform Act constitutional).

151. Prince v. Firman, 584 A.2d 8, 10-11 (D.C. 1990) (finding statute requiring reversion of church property to contributors or their heirs upon dissolution of church does not violate Free Exercise Clause).

152. St. John's Lutheran Church v. State Compensation Ins. Fund, 830 P.2d 1271, 1278 (Mont. 1992) (holding that designation of pastor as employee for purposes of workers' compensation does not infringe free exercise rights of church).

153. Intercommunity Ctr. for Justice & Peace v. INS, 910 F.2d 42, 44-46 (2d Cir. 1990) (citing *Smith*, but finding same result required by balancing test).

154. Young v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939 (Bankr. D. Minn. 1993).

II. When Is a Law Neutral and Generally Applicable?

If Title VII is neutral and generally applicable, then religious employers are subject to the rule of *Smith* and must present a "hybrid" claim in order to obtain an exemption.[155] This Part reviews the Supreme Court's most recent efforts to explain the neutral and general application requirement. While the meaning of neutrality remains elusive, this Part concludes that Title VII qualifies as a neutral law of general application under any possible standard. Finally, this Part considers the somewhat counterintuitive position that the antidiscrimination laws are *not* neutral because their exemptions accord special privileges to religious employers.

A. Incidental Burdens and Dominant Effects

Smith elevated the "neutral and generally applicable" requirement to the first tier of constitutional importance, yet offered little insight as to the factors relevant to that inquiry. One negative inference that can be drawn from *Smith* is that a law is *not* neutral if it singles out religion for special regulation or bans conduct only when it is performed for religious reasons.[156] The opinion also suggests that in order to be considered neutral, a law may not have the suppression of religion as its purpose, object, or dominant effect.[157] This formulation is considerably more problematic to apply.

The "dominant effect" language echoes the second prong of *Lemon*, which condemns laws whose "primary effect" advances or inhibits religion.[158] This prong of the *Lemon* test has generated confusion in the establishment context largely because the dual prohibition is not easily avoided.[159] Even without the burden of a dual prohibition, however, the concept of dominant effect carries its own baggage.

Consider a law enacted by the mythical State of Restless in the late nineteenth century. The law prohibits mass marriages. The drafters of the prohibition, lacking any prescient inklings of the teachings of the Reverend Sun Myung Moon, intended merely to enhance the solemnity and uniqueness of marriage ceremonies. Most would grant this as a legitimate, if paternalistic, secular purpose. A century after

155. *See supra* text accompanying notes 23-25.
156. Employment Div. v. Smith, 494 U.S. 872, 877-78 (1990).
157. *Id.*
158. *See supra* note 127.
159. *See generally* William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 509-10 (1986) (summarizing and critiquing the Court's establishment jurisprudence).

its enactment, let us further suppose that an enterprising prosecutor attempts to enforce the law against the Unification Church. The Church files a legal challenge, alleging that the law violates the Free Exercise Clause.

From the perspective of the court, the terms "neutral and generally applicable" seem almost irrelevant. Does this law discriminate against religion? What is its dominant effect? It is clear that the law is a source of frustration largely to the followers of Reverend Moon, but is that enough to justify a finding of non-neutrality? Does the secular purpose of the legislation matter? Or should an entirely different showing be required?

If the hypothetical ban on mass marriages has a dominant effect of suppressing religious practices, then it is difficult to know what to think of *Smith*. The majority fused the question of effect together with the issue of centrality, i.e., the extent to which the rule burdens a religious practice of critical importance to believers. The majority deemed questions of centrality to be beyond the judicial competence.[160] It was remarkably unmoved by the fact that Oregon's criminal prohibition on peyote use fell primarily upon Native Americans using the substance for religious purposes.[161] As Justice O'Connor observed in her concurrence, the questions are closely related.[162]

1. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

If *Smith* confused the issue of neutrality by not confronting it, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[163] erred in the opposite direction. As the Supreme Court's only free exercise decision in the 1992-93 term, and one that turned on neutrality and general application, it was hoped that the case would clarify the Court's intention. Unfortunately, what appeared to most observers to be an easy case raised more questions than it answered.

Issuing four separate opinions, the Court unanimously struck down four city ordinances regulating animal sacrifice. The unanimity

160. *Smith*, 494 U.S. at 887.

161. *See id.* at 916 (Blackmun J., dissenting) (noting that there is practically no illegal traffic in peyote).

162. *Id.* at 907 (O'Connor, J., concurring) ("The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one . . . that courts are capable of making."); *see also* Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 757 (1992) (arguing that problems generated by the centrality inquiry tend to occur on the margins; when it is beyond controversy that a law impinges upon the spiritual core of a religious tradition, that factor should be given weight by the courts).

163. 113 S. Ct. 2217 (1993).

stemmed from the Court's finding that the ordinances were not neutral laws because their object was the suppression of a particular religious practice. In their discussions of neutrality, the Justices considered the intent of the city council, the identity of the persons most likely to be affected by the ordinances, and the disparity between the council's stated goals and the means used to achieve those goals. None of the Justices expressed a view as to which of these factors was most important to the neutrality inquiry, and there was serious disagreement as to whether the motivations of the city council should be considered.[164]

Despite the Court's fragmentation, *Lukumi Babalu* did establish some ground rules. According to a seven-member majority led by Justice Kennedy, a law is not neutral if it either prohibits conduct that is engaged in for religious reasons or discriminates against religious beliefs[165]—formulations that could best be described as uninformative. The former prohibition was clearly descriptive of the Oregon drug laws in *Smith*, while the latter is more conclusory than illuminating.

The factors explicitly detailed by the Court lend little additional insight. The ordinances did not explicitly target religious beliefs, yet the Court was able to find that the "object" of the law was to suppress the central religious practices of Santeria worship ceremonies.[166] The Court based this finding upon the effect or operation of the ordinances, which the Court found prohibited almost nothing but Santeria sacrifices.[167]

While the reasoning of *Lukumi Babalu* may be muddled, the result the Court reached is clearly correct. The ordinances were aimed at practitioners of the Santeria religion in all but name. As the Court noted, a careful pattern of exclusions within the laws operated to protect existing restaurants and slaughterhouses and the killing of animals for food consumption. This pattern of exemptions, the Court observed, was so patent as to amount to a "religious gerrymander."[168]

164. *See infra* text accompanying notes 171-73.

165. *Lukumi Babalu*, 113 S. Ct. at 2227.

166. While the Court did not focus on the "centrality" of animal sacrifices to the Santeria religion as a basis for striking down the law, the Court did discuss the importance of sacrifice to the Santeria religion. *Id.* at 2222-23, 2227-30.

167. One ordinance excluded Kosher slaughter and permitted the killing of animals for reasons other than religious sacrifice. *Id.* at 2228.

168. *Id.* at 2229; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 696 (1969) (Harlan, J., concurring) ("The Court must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders.").

The Court also concluded that the ordinances were not generally applicable[169] since they prohibited the killing of animals for religious reasons and exempted most animal deaths caused by nonreligious reasons. This demonstrated the council's intent to discriminate against religion.[170]

In a portion of the opinion that garnered only a single supporting vote,[171] Justice Kennedy considered the legislative history of the ordinances. This analysis encompassed the events leading to their enactment, including statements of council members and other city officials as well as timing considerations (the ordinances were passed shortly after the church announced plans to open a house of worship in the city).[172] Seven Justices refused to consider this evidence, and the Chief Justice joined Justice Scalia's separate concurrence, which opposed the use of evidence intended to demonstrate the "subjective motivation of the lawmakers."[173]

2. *The Tension Between* Smith *and* Lukumi Babalu

Taken together, *Lukumi Babalu* and *Smith* send confusing signals about the "neutral" and "generally applicable" requirements. It would seem beyond contention that a law which makes it a criminal offense to engage in a religious communion ceremony has the effect of

169. Justice Scalia would not have bifurcated the Court's inquiry into the "neutrality" and "general applicability" of the Hialeah ordinances, since he believes that the terms substantially overlap. *Lukumi Babalu*, 113 S. Ct. at 2239 (Scalia, J., concurring). According to Scalia, a law is not neutral if it explicitly imposes disabilities upon the basis of religion. *Id.* A law is not generally applicable if it is neutral on its face, but operates in a discriminatory fashion against a particular religion because of its design, construction, or enforcement. *Id.* However, only the Chief Justice joined with Justice Scalia in this extremely restrictive interpretation of neutrality and general applicability. *Id.*

170. The city exempted hunting for sport, slaughter of animals for food, eradication of insects and pest, euthanasia and the use of live rabbits to train racing greyhounds from the prohibitions of its animal cruelty laws. *Id.* at 2223. In this portion of the opinion, the majority noted that the ordinances were both overbroad and underinclusive. The ordinances restricted more religious conduct than was necessary to achieve their stated goals and failed to prohibit nonreligious conduct that caused the same harms as the prohibited religious conduct. Justice Kennedy concluded that the council's interests in preventing animal cruelty and protecting public health could have been achieved by more narrowly tailored laws regulating the condition and treatment of the confined animals, as well as methods of slaughter and the disposal of organic waste. *Id.* at 2228-30, 2232-34.

171. Only Justice Stevens joined this portion of Justice Kennedy's opinion. *Lukumi Babalu*, 113 S. Ct. at 2230-31.

172. *Id.* at 2229-33.

173. *Id.* at 2239 (Scalia, J., concurring). Justice Scalia is well known for his opposition toward inquiries into the intent of legislative bodies, in part because the motivating forces behind group action are difficult to identify with precision. *See generally* Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting).

suppressing religious practices. If such an effect is truly an "incidental burden,"[174] rather than a "dominant effect," then there are two possibilities. Either the Oregon drug law was acceptable because it did not single out the religious use of peyote but also banned nonreligious use, or the statute had a "dominant effect" other than the suppression of religious practices.

Neither formulation is entirely satisfactory. While the Oregon law did not expressly single out the religious use of peyote by Native Americans for prohibition, neither did the Hialeah ordinances specifically prohibit the killing of animals by adherents of Santeria.[175] If the "dominant effect" of the drug laws in *Smith* is the prohibition of illegal drug use, then the levels of generality implicit in the Court's analysis may need to be reexamined. As Justice Blackmun pointed out, permitting the government to defend a law based on general societal interests rather than the specific governmental interest in denying the exemption places a heavy thumb on the scales of the judicial inquiry.[176]

Justice Scalia's concurrence in *Lukumi Babalu* takes a very different tack. He states that non-neutral laws are those which single out religion for adverse treatment, and laws that are not generally applicable are those that, while neutral on their face, operate in a discriminatory fashion because of discriminatory enforcement or other factors.[177] Under this approach, the hypothetical ban on mass marriages may be struck down, and the ordinances in *Lukumi Babalu* will go, but most state laws will survive constitutional challenges. A prohibition law, for example, which failed to include an exemption for sacramental wine could probably be upheld, so long as there were no difficulties of selective enforcement against a particular religious sect.

This approach is deeply unsatisfactory. The most compelling response to Justice Scalia is found in *Smith* itself. As both the concurrence and dissent argued, an inquiry into a law's neutrality and general application misses the point. Neutral laws can burden religion

174. Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

175. *Lukumi Babalu*, 113 S. Ct. at 2234-36.

176. *Smith*, 494 U.S. at 909-10 (Blackmun, J., dissenting) ("Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor."); *see also* Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992) and Frank Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992) (exchanging views on levels of generality in constitutional interpretation).

177. *Lukumi Babalu*, 113 S. Ct. at 2239 (Scalia, J., concurring).

as grievously as non-neutral laws, and at some point these burdens become intolerable.[178]

Justice Souter's concurrence in *Lukumi Babalu* actually presented the clearest description of the neutrality requirement. Borrowing from Professor Laycock,[179] Justice Souter identified three types of neutrality: formal neutrality, which asks whether the object of the law is to discriminate against religion; facial neutrality, which asks the same question, but looks only to the text of the law and its operation rather than to the intentions of its drafters; and substantive neutrality, which would require government accommodation of religious differences by exempting religious practices from formally neutral laws.[180] As Justice Souter observed, the neutrality required by *Smith* appears to be mere "formal neutrality."[181]

In short, *Lukumi Babalu* offers little more than competing visions of neutrality and general applicability. While the majority's interpretation of the requirement suffers from the pox of indeterminacy, a sickness common to multi-factor equations, Justice Scalia's approach offers a bright-line test that, like *Smith*, leaves too little religious conduct on the safe side of the line.

If hard cases make bad law, easy cases may do no better.[182] While *Lukumi Babalu* identified a group of laws that fell short of the "neutral and generally applicable" standard, it did little more than establish that the extreme end of the spectrum is indeed a constitutional violation. The ordinances at issue were a thinly veiled example of overt religious discrimination. Moreover, because the Court fragmented over such an apparently clear-cut case, it is difficult to predict the application of the majority's neutrality test to laws that are not so obviously defective.

B. Title VII: A Neutral Law of General Application

While the identifying characteristics of a "neutral and generally applicable" law remain uncertain,[183] federal anti-discrimination laws like Title VII are likely to qualify under any of the proposed stan-

178. Justice O'Connor expressed this position in *Smith* in a concurring opinion. *Smith*, 494 U.S. at 896 (O'Connor, J., concurring). Justice Souter subsequently argued it in his *Lukumi Babalu* concurrence. *Lukumi Babalu*, 113 S. Ct. at 2242 (Souter, J., concurring).

179. Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

180. *Lukumi Babalu*, 113 S. Ct. at 2242 (Souter, J., concurring).

181. *Id.*

182. DEBORAH RHODES, JUSTICE AND GENDER 281 (1989).

183. *See supra* notes 156-82 and accompanying text.

dards. These laws are not specifically directed at religious practice and do not prohibit conduct only when it is engaged in for religious reasons. On the contrary, Title VII exempts religious employers from its prohibition on religious discrimination in hiring, and statutory defenses like the BFOQ provision are available to religious employers. Employment discrimination laws do not have the dominant purpose or effect of suppressing religious exercise; rather, their dominant purpose and effect is the creation of equal employment opportunities.

Even more fundamentally, the substantive provisions of Title VII which prohibit discrimination on the basis of race, color, sex, and national origin apply equally to all employers, regardless of their religious affiliation. Since the statute itself treats all employers equally with respect to those prohibitions, the law is plainly neutral as to those strictures. Cases like *McClure*, which limit the application of Title VII to certain employment relationships,[184] do not in any way affect the neutrality of the statute, taken on its own terms.

Title VII suffers from none of the flaws that proved fatal to the ordinances in *Lukumi Babalu*. It does not specifically target religious conduct—on the contrary, it exempts some religious employers from its prohibition on religious discrimination.[185] While the statute reaches a great deal of secular conduct and its provisions are broad, none of its detractors have suggested that it amounts to a "religious gerrymander." Instead, the legislative history of the federal anti-discrimination laws demonstrates an unequivocal secular purpose on the part of Congress to assure equal employment opportunities for all citizens.[186] In short, given the independent purpose of the anti-discrimination laws and the exemptions provided to religious employers, it is difficult to imagine that those laws would not qualify as neutral laws of general application within the meaning of *Smith*.

C. Religious Exemptions and Neutrality

Religious employers are likely to recognize that *Smith* reduces the constitutional protection available to them, and they may be uncertain of their ability to persuade a court that hybrid rights are at stake.[187] Accordingly, some will probably attempt to distinguish *Smith* by showing that anti-discrimination laws are not neutral and

184. *See supra* text accompanying notes 86-91.

185. *See* 42 U.S.C. § 2000e(1) (1988).

186. *See generally* Hearings on Civil Rights Act of 1964, H. Rep. No. 914, 88th Cong., 2d Sess. (1964), 1964 U.S.C.C.A.N., 2401, 2513-17; CHARLES WHALER & BARBARA WHALER, THE LONGEST DEBATE 198, 215 (1985).

187. *See infra* text accompanying notes 190-233.

generally applicable, if only as a fallback to a hybrid-rights defense. To do this, they must argue that the partial exemptions permitting discrimination on the basis of religion render the laws non-neutral toward religion. This argument reverses fundamental premises that both *Smith* and its critics take for granted.

Smith divides the universe of laws into laws that are neutral and generally applicable on the one hand, and non-neutral laws on the other. Neutrality is critical; a majority of the Justices in *Smith* believed that persons seeking exemptions for religiously motivated conduct are not constitutionally injured by neutral laws.[188] This view has been persuasively challenged,[189] but all agree that only laws injuring religious claimants raise free exercise issues. Religious employers must argue that singling out religion for *favorable* treatment amounts to a free exercise injury. This position would subsume Establishment Clause values into the free exercise analysis to the exclusion of traditional free exercise concerns because giving religion preferential treatment would be considered a free exercise problem rather than an establishment of religion.

In short, if neutrality means anything in the context of free exercise, it means that a law does not single religion out for *unfavorable* treatment. Laws that *favor* religion raise Establishment Clause concerns but cannot, by any stretch of the imagination, be said to present a free exercise issue.

Moreover, even if religious employers attacked the validity of Title VII's exemptions using traditional Establishment Clause analysis, a victory would leave them worse off. If a religious employer persuaded a court that, as applied to them, Title VII exemptions violate the Establishment Clause, the appropriate judicial response would be to strike down the offending portion of the statute—i.e., the exemption. The employer would be left facing a plainly neutral statute that unequivocally prohibited discriminatory conduct.

A claim that Title VII's religious exemptions are unconstitutional would not help religious employers, even in the unlikely event of its success. The religious employer would then have no arguably applicable exemptions, and the *Smith* rule would clearly apply. As a result, the employer would have to demonstrate a hybrid claim in order to obtain a constitutional exemption from the statute.

188. Employment Div. v. Smith, 494 U.S. 872, 891-92 (1990) (O'Connor, J., concurring).
189. *See* sources cited *supra* note 29.

III. Hybrid Claims Available to Religious Employers

As the preceding Part demonstrated, the courts are likely to hold that Title VII is a neutral law of general application, thereby bringing religious employers who seek exemptions within the rule of *Smith*. According to *Smith*, exemptions from neutral laws may not be granted on the basis of free exercise rights alone. Religious employers who seek to immunize their employment decisions must show that the application of Title VII to their employment practices violates a constitutional right other than free exercise. This Part will consider how hybrid claims for exemptions are likely to be framed, and the difficulties courts will face in evaluating such claims.

A. Associational Rights

A leading candidate for a hybrid rights claim is the guarantee of free association created by the First Amendment. The Supreme Court considered the scope of associational rights at some length in *Roberts v. United States Jaycees*,[190] and identified two different aspects of associational freedom that are protected by the First Amendment. First, the Court recognized "intimate association," which refers to the right of individuals to enter into certain close relationships without the intrusion of the state. This aspect of associational freedom was described as an independent right of personal liberty.[191]

The second type of associational liberty derives from other First Amendment freedoms, and is closely connected to them. The Court recognized that individuals may wish to join together in constitutionally protected activities such as speech or religious worship to enhance the public impact of their activities. In this incarnation, the right to associate furthers the preservation and exercise of other individual liberties. The Court dubbed this the freedom of "expressive association."[192]

1. The Right to Intimate Association

In *Roberts*, the Court found that rights of intimate association would not protect a large and unselective organization like the Jaycees

190. 468 U.S. 609 (1984) (deciding that the application of state anti-discrimination laws did not violate associational rights of Jaycees).

191. *Id.* at 618-19; *see also* New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) (upholding application of state anti-discrimination laws to large private clubs); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (upholding application of state anti-discrimination law to California Rotary Clubs).

192. *Roberts*, 468 U.S. at 618.

from the application of state anti-discrimination laws.[193] The Court found that rights of intimate association generally apply to the creation and maintenance of family units, whose essential characteristics are relative smallness, a high degree of selectivity, and seclusion from others.[194] The protection afforded these relationships recognizes their importance in an individual's efforts to define a personal identity, to obtain emotional enrichment and to cultivate and transmit shared ideas and values.[195] Because the Jaycees were relatively large, unselective, and permitted the involvement of women and other nonmembers in many of their functions, they were unable to claim the benefit of intimate associational rights.[196]

The same features that doomed the Jaycees' claim to intimate associational privileges are likely to prove problematic for religious institutions. While some religious organizations might be able to establish a claim to intimate association under *Roberts*, the majority of established churches are unlikely to succeed in doing so. While even a large religious institution may play an important role in the development and formation of individual identity, the other criteria deemed necessary by *Roberts*—smallness, selectivity, and seclusion—are not features regularly associated with mainstream religious institutions.

Since *Roberts*, the Court has refused to recognize intimate associational rights in a variety of settings. The Court in *Bowers v. Hardwick*[197] upheld laws prohibiting sodomy as applied to consenting adults inside a private home. However, the dissent raised the right of intimate association as a basis for the laws' unconstitutionality.[198] Two cases involving private clubs of varying size refused to recognize the right of intimate association as a defense to the application of state anti-discrimination laws.[199] Overall, the Supreme Court has consist-

193. *Id.* at 621.

194. *Id.* at 619-20.

195. *Id.*; *see generally* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (identifying the rights and values protected by intimate association, such as marriage and procreation); William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. REV. 68 (1986) (discussing the application of anti-discrimination laws to private organizations).

196. *Roberts*, 468 U.S. at 618-22.

197. 478 U.S. 186 (1986).

198. *Id.* at 199 (Blackmun, J., dissenting).

199. New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) (upholding city law that prohibited discrimination by clubs that were not "distinctly private," i.e., that provided benefits to business entities and nonmembers); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (upholding state law requiring equal access to business establishments as applied to Rotary clubs with memberships ranging from less than 20 to more than 900).

ently refused to recognize rights of intimate association outside the context of marriage,[200] procreation[201] and child-rearing,[202] and cohabitation with family members.[203] Because the rights of intimate association have been so closely identified with familial concerns, most religious organizations would be unwise to place primary reliance on a claim of intimate association and should instead turn their energies toward a claim of expressive associational rights.

2. *The Right to Expressive Association*

As the Court recognized in *Roberts*, the right to associate with others for expressive purposes is an essential concomitant of the individual's right to exercise First Amendment speech rights. Protection for collective efforts to assert constitutional rights helps to preserve cultural and political diversity and shields the voices of dissident groups from majoritarian suppression.[204] *Roberts* also recognized that the freedom of association presupposes the right not to associate with persons not of one's own choosing.[205] Thus, to the extent that the imposition of anti-discrimination laws on religious organizations requires the employment of "unwanted" individuals, rights of expressive association are clearly implicated.

The right to associate for expressive purposes, however, is not absolute. In *Roberts*, the Court applied traditional First Amendment balancing principles and found that compelling state interests in eradicating discrimination against women outweighed the Jaycees' interest in free association. The Court found that the Minnesota Human Rights Act served a compelling state interest unrelated to the suppression of expression, namely assuring its citizens equal access to publicly available goods and services.[206] The Act also tended to limit the stigmatic injuries that result when women and other disadvantaged groups are denied opportunities for economic advancement and social

200. Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (striking down court-imposed restrictions on marriage licenses).

201. Carey v. Population Serv. Int'l, 431 U.S. 678, 700-02 (1977) (invalidating statute limiting distribution of contraceptives).

202. Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925) (holding that parents have right to direct the education of their children).

203. Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (invalidating zoning regulations that restricted family members from sharing household).

204. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1983).

205. *Id.* at 623.

206. *Id.* at 625.

integration.[207] The Court found that the application of the Act to the Jaycees represented the least restrictive means of achieving the state's goals, and that the Jaycees had failed to show that admitting women as full voting members would change the content or impact of the organization's speech or political activities.[208]

There are several obstacles that a religious employer will need to overcome to establish a hybrid exemption claim based on the right of expressive association. The first is best characterized as a hermeneutic dilemma. The right of expressive association, according to *Roberts*, is a derivative right to engage in other, independently protected constitutional liberties. Free exercise rights, according to *Smith*, are inadequate standing alone to justify exemptions from neutral generally applicable laws. What is lacking in a hybrid claim composed of free exercise and expressive associational rights, is an independent right of constitutional stature. Put differently, why should the combination of two rights, each of which is inadequate standing alone to support a constitutional exemption, suddenly assume constitutional significance?

A second difficulty is even more imposing. In each of the cases where private organizations have sought to resist the application of anti-discrimination laws, the Court has focused its inquiry on whether the organization would be able to advance its views effectively despite application of the anti-discrimination laws. As Justice O'Connor observed in *Roberts*, this test is not especially protective of associational liberties.[209] In fact, each time the Court has so formulated the inquiry, the association has been unsuccessful in its efforts to avoid the application of the anti-discrimination laws.

As applied to employment discrimination, the Court's emphasis on the ability of the organization to effectively advance its views provides very little protection to religious employers. At a minimum, protection for "viewpoint" dissemination may immunize the selection of ministers, clergy, teachers and other "spokespersons" for the religious organization. It may not even go so far. A Protestant church that does not exclude women from serving as clergy as a matter of doctrine and is internally divided on the issue—having appointed some women to the clergy—would have a more difficult time advancing the "viewpoint" claim than, say, the Catholic Church, which ex-

207. *Id.*; *accord* New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987).

208. *Roberts*, 468 U.S. at 626-29.

209. *Id.* at 632-33 (O'Connor, J., concurring).

cludes women from the priesthood based on the apostolic tradition. At any rate, such analysis is unlikely to immunize discrimination against employees other than church spokespersons, because the selection and retention of clerical, service, and maintenance personnel does not affect a church's ability to advance and promulgate its views.

The single, most fundamental problem with predicting the Court's approach to hybrid claims composed of free exercise and expressive association rights is that the Court's analytical framework for dealing with expressive association simply does not fit the typical understanding of religion. As noted above, the viewpoint test provides minimal protection for any organization, since it narrowly focuses on the organization's expressive purposes. The test reflects the factual context in which rights of expressive association have been developed by the Court, which is (as the name implies) closely connected to freedom of speech. Religious organizations, however, pursue goals that go beyond, and may be entirely unrelated to, public speech and viewpoint dissemination. Attempts to analyze the effect of imposing antidiscrimination laws upon religious employers must take into account the fact that religious organizations are concerned with more than just their right to engage in public discourse.[210]

3. *Justice O'Connor's Commercial Activity Test*

Justice O'Connor wrote a separate opinion in *Roberts*, suggesting that constitutional protection for association should not turn on mechanical application of "compelling interest" analysis. Instead, Justice O'Connor favored the creation of a flexible standard that provided more protection for organizations engaged in purely expressive activities than to those engaged in commercial activities.[211]

This approach, which provides substantial guidance in evaluating the claims of organizations like the Jaycees, Kiwanis Clubs, and Rotary Clubs, is problematic as applied to religious organizations. Justice O'Connor's test would provide comprehensive protection to religious institutions that were not predominantly commercial in nature. A publishing house with a religious affiliation[212] or a foundation en-

210. *Cf.* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 546 (1983) (arguing that free exercise protection should be coextensive with the protection afforded speech).

211. *Roberts*, 468 U.S. at 635-38 (O'Connor, J., concurring).

212. EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982).

gaged in commercial activity[213] would not be entitled to the protection of expressive associational rights. Churches, religious schools, and other organizations whose primary activities are not commercial would be protected.

The irony is that Justice O'Connor's more expansive reading of associational rights would have the (no doubt unintended) effect of swallowing *Smith*. Since her test does not take account of size or selectivity, even large churches would be entitled to claim associational rights so long as they minimized their commercial activities. Using Justice O'Connor's approach, many churches could claim associational rights, in addition to free exercise rights, as the basis for an exemption from anti-discrimination laws. Once a hybrid claim is established, the state would be required to show a compelling interest in denying the exemption. Whatever the merits of O'Connor's test within the context of private club cases, applying her reasoning to hybrid right cases would reverse the presumption against exemptions from neutral laws that *Smith* so carefully crafted.

In fact, under Justice O'Connor's approach, *Smith* itself comes out differently. Members of the Native American Church would certainly be able to establish a right of expressive association, based upon their lack of commercial activity. Once a hybrid claim of free exercise/associational rights is presented, Oregon would have to demonstrate a compelling interest in denying members of the Native American Church an exemption from state narcotics laws. In applying the compelling interest test to the facts of that case, only one member of the Court believed that the state's interest in denying the exemption was compelling—Justice O'Connor—and she conceded that the question was close.[214]

The implication is clear. *Smith* by its terms suggests a far narrower reading of associational rights than O'Connor's approach would provide. If *Smith* is on a collision course with the rest of the Court's free exercise jurisprudence, as many have suggested,[215] then an expansive reading of associational rights will hasten and exacerbate that collision. Churches that present these claims will have the opportunity to obtain exemptions from generally applicable neutral laws in many of the contexts that the *Smith* majority was unwilling to countenance,

213. Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (applying Fair Labor Standards Act to religious organization over Establishment Clause challenge).

214. Employment Div. v. Smith, 494 U.S. 872, 903-05 (1990) (O'Connor, J. concurring).

215. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2243 (1993) (Souter, J., concurring); *see also* Laycock, *supra* note 29, at 2-3.

including compulsory military service, payment of taxes, social welfare legislation and child labor laws.[216] If *Smith* is to have any doctrinal significance, or even to survive as a rule of law based upon its own facts, associational rights must be narrowly defined.

B. Freedom of Speech

A second candidate for a hybrid rights claim is the First Amendment's guarantee of free expression. Rights of free speech and free exercise frequently overlap, and many of the Supreme Court's "religion clause" cases can be equally well characterized as "speech" cases.[217] In fact, it has been argued that the protections afforded religion under the Free Exercise Clause should be coextensive with the protections afforded nonreligious speakers under the Speech Clause.[218] The Supreme Court may have partially ratified this view in *Smith* by approving exemptions to neutral laws only in cases involving hybrid rights, including the right of free speech.[219]

While the Speech Clause provides significant protection for religion in certain areas, including the right to preach religious doctrine,[220] the right to use school facilities for religious purposes,[221] and the prohibition on religious oaths as a condition of public office,[222] this protection will be of little assistance to employers seeking exemptions from employment discrimination laws for the following reasons.

1. Free Speech and the Employment Relationship

As even a cursory overview of the case law demonstrates, most cases involving the right to free speech do not arise in the employment context. Those that do tend to involve claims by public employees that the government has in some way abridged their free speech

216. *Smith*, 494 U.S. at 888-89.

217. Wooley v. Maynard, 430 U.S. 705 (1977) (statute requiring display of state motto on license plates repugnant to plaintiff's religious convictions and violates free speech); Saia v. New York, 334 U.S. 558 (1948) (loudspeaker permit requirement violates free speech rights of Jehovah's Witnesses using speaker for preaching); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (requirement that schoolchildren perform flag salute violates free speech and free exercise); Cox v. New Hampshire, 312 U.S. 569 (1941) (parade regulations violate free speech rights of Jehovah's Witnesses).

218. Marshall, *supra* note 210, at 575-93.

219. William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 364, 371-72 (1989).

220. *Saia*, 334 U.S. at 561.

221. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147 (1993) (schools); Widmar v. Vincent, 454 U.S. 263, 267 (1981) (universities).

222. Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (state may not make belief in God a precondition of holding public office).

rights.[223] Cases in which the free speech issue arises on the employer's side, as a basis for resisting government regulation, are rare. Employers are generally unsuccessful in these cases, for two reasons. First, these cases mainly arise in the context of commercial speech, which the Supreme Court affords only limited constitutional protection.[224] Second, the government interest in preventing harmful speech has trumped the employers' right to free speech where that speech was intended to further discriminatory hiring practices.[225]

The paucity of case law that would support an employer's right to assert free speech as a defense to an employment discrimination claim is significant, largely because the defense was available long before *Smith*. If the right to free speech were sufficient to avoid the application of federal anti-discrimination laws, religious employers would have been able to obtain exemptions on that basis all along, even before *Smith* made the claim explicit. Because no such claim has ever been raised, much less succeeded, the success of a hybrid claim composed of free speech and free exercise would seem unlikely.[226]

2. *Content Neutrality and Superfluity*

Another difficulty with a hybrid rights claim composed of freedom of speech and free exercise has been pointed out by Professor William P. Marshall, the leading proponent of limiting free exercise

223. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 392 (1987) (government may not discharge clerk-typist for making approving comments following Reagan assassination attempt); Connick v. Myers, 461 U.S. 138, 146 (1983) (government may discharge employee for speech relating to employee grievances, rather than to matters of public concern); Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) (government may not discharge employee for constitutionally protected speech).

224. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (establishing four-factor test for restrictions on commercial speech).

225. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (government may prohibit single-sex, help-wanted advertisements).

226. Some may argue that religious employers had little incentive to raise a free speech defense before *Smith* because they were unaware that hybrid claims were necessary to justify an exemption. But this argument must fall when one considers the extraordinarily limited number of cases in which free exercise exemptions have been granted by the courts, not only by the Supreme Court, but by the lower courts as well. In *Smith*, Justice Scalia suggested that only seven free exercise claims have been successful, and five of those primarily involved the right to free speech. Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990); *see, e.g.*, James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1459-62 (1992) (appendix showing 85 "Free Exercise claims that lost" and only 12 "Free Exercise claims that won" in the U.S. Circuit Courts between 1963-90). While *Smith* made the need for a hybrid claim explicit, any employer able to raise a free speech defense had sufficient encouragement, based on the losing record of free exercise exemptions, to present the claim.

protection to that afforded speech.[227] If a religious employer claims that the right to hire and fire employees amounts to symbolic speech, as well as a religious activity, then any special treatment by the legislature for such activities could violate the requirement of content neutrality imposed by the Speech Clause.[228] Thus, to the extent that employment actions are speech, they cannot be regulated based on their religious content consistently with the demands of the First Amendment. This dilemma further illustrates the inherent instability of the hybrid rights jurisprudence created by *Smith*.

The final difficulty with a free speech/free exercise hybrid is the simplest of all. The religious employer who seeks an exemption on such grounds has gained nothing from *Smith* that it did not already have. If the Free Speech Clause standing alone did not suffice to warrant an exemption prior to *Smith*, then free speech/free exercise hybrids will stand on no better footing. The religious employer will gain little, if anything, from the joinder of claims.

Of course, this only serves to highlight the central analytical flaw of *Smith* itself, namely that providing exemptions only to religious claimants who can establish a hybrid claim deprives the Free Exercise Clause of independent meaning. If the government conduct at issue impinges upon the claimant's rights of free speech, or association, then the claimant can argue that the law is unconstitutional as applied on that basis alone, even without the free exercise component. In short, the problem with a hybrid free speech/free exercise claim is not only one of infrequent joinder, but of superfluity.

C. The Unenumerated Right of Parental Control

The problem of superfluity becomes even more apparent when one considers the possibility of a hybrid claim composed of free exercise and unenumerated rights, such as the right of parents to direct the education of their children. This right of "parental control" was described by the *Smith* majority as the basis for *Wisconsin v. Yoder*.[229] *Yoder* exempted Amish parents of children over the age of sixteen from state compulsory education laws.

An exemption based on a hybrid claim of parental control and free exercise would face several overwhelming difficulties. First, if

227. Marshall, *supra* note 219, at 400.

228. *Id.*

229. 406 U.S. 205 (1972). A right of parental control might also be derived from Pierce v. Society of Sisters, 268 U.S. 510 (1925) (upholding right of parents to send their children to sectarian schools).

that particular hybrid claim warrants an exemption, yet free exercise standing alone would not, then the Court has elevated unenumerated rights over an explicit Constitutional provision.[230]

The second difficulty is that there may be no such thing as an "unenumerated" right of parental control outside the context of free exercise. *Yoder* indicated that parents who seek exemptions from compulsory schooling laws for philosophical rather than religious reasons would not be entitled to an exemption.[231] *Pierce v. Society of Sisters*,[232] another decision that arguably turned on the right of parental control, is equally dependent on the Free Exercise Clause because the parents in that case sought to place their children in private schools for religious reasons.[233]

In short, *Smith*'s characterization of *Yoder* as a hybrid case may be disingenuous. If the Supreme Court is directly presented with the issue, the right of "parental control" may simply disappear into the Free Exercise Clause and turn out to be a subset of free exercise rights more commonly raised by individuals on their own behalf.

In any event, a hybrid claim composed of parental control and free exercise is unlikely to be available to the majority of religious employers. The right of parents to direct the education of their children, if it exists outside the context of free exercise, simply will not apply to the vast majority of employment relationships, as they do not entail familial connections. Thus, as with the freedom of speech and association, this avenue holds little promise for religious employers.

Conclusion

The example of employment discrimination in religious contexts validates the concerns of many commentators who have criticized *Smith* on theoretical grounds. After *Smith*, it appears religious employers will be unable to obtain constitutional exemptions from employment discrimination laws. Because the statutory exemptions from those laws fail to protect religious employers from liability for common employment practices, it appears *Smith* has set the stage for a serious reevaluation of the rights of religious groups.

Moreover, the analysis of hybrid claims suggests a fundamental tension between *Smith* and the associational rights of religious groups. If associational rights are broadly defined in the religious context,

230. *See, e.g.*, Laycock, *supra* note 29, at 37-39.
231. *Yoder*, 406 U.S. at 215-16.
232. 268 U.S. 510 (1925).
233. *Id.* at 532.

then *Smith* itself cannot stand. If associational rights are narrowly construed, then hybrid rights may be largely illusory outside the context of religious speech. The latter alternative provides no protection for religious employers; the former may provide a strategic weapon to those who would overturn *Smith* and return independent stature to the Free Exercise Clause.